

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WAKINYAN WAKAN MCARTHUR,

Defendant.

Case No. 12-00026(1)(JRT/JSM)

MOTION TO VACATE CONVICTION

COMES NOW Defendant, WAKINYAN WAKAN MCARTHUR, by and through the undersigned counsel, and pursuant to Federal Rules of Criminal Procedure 36 and 47 hereby moves to vacate his conviction on Count 2 of the Superseding Indictment on the grounds of actual innocence. Defendant is convicted in Count 2 of the offense of conspiracy to use and carry firearms during and in relation to a crime of violence in violation of 18 U.S.C. § 924(o). The predicate “crime of violence” alleged in Count 2 is conspiracy to participate in racketeering activity in violation of 18 U.S.C. § 1962(d) as alleged in Count 1 of the Superseding Indictment. (ECF No. 1060-4). The RICO conspiracy was only a “crime of violence” under the “residual clause” of 18 U.S.C. §924(c)(3)(B). Under *United States v. Davis*, 139 S.Ct. 2319, 2336 (2019); §924(c)(3)(B)’s residual clause is unconstitutionally vague. Under *United States v. McArthur*, 784 Fed. Appx. 459 (8th Cir. 2019); the RICO conspiracy is not a “crime of violence” under §924(c). Because the predicate offense to the § 924(o) conspiracy is not

a crime of violence, McArthur's conviction on Count 2 is invalid and Defendant's conviction on this count should be vacated.

This motion is based upon the court file and all records and proceedings herein, upon the attached memorandum of law and upon the argument of counsel at the hearing on this motion.

Dated this 5th day of December, 2019.

Respectfully submitted,

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